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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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CAROLINE ANGULO, et al.,	CASE NO. C22-0915JLR
Plaintiffs,	ORDER
v.	
PROVIDENCE HEALTH & SERVICES WASHINGTON, et al.,	
Defendants.	

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I.   INTRODUCTION

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Before the court is the parties' joint motion requesting that the court enter either

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Plaintiffs Caroline Angulo, Eric Keller, Isabel Lindsey, and Charles Lindsey's

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(collectively, "Plaintiffs") or Defendant Providence Health & Services Washington's

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("Providence") proposed protective order. (Joint Statement (Dkt. # 67); Pls' Prop. Order

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(Dkt. # 67-5); Providence's Prop. Order (Dkt. # 67-4).) The parties indicate that they

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reached agreement on the terms of a protective order with seven exceptions. (*See* Joint

1   Statement at 3-10; *see also infra* §§ II.A-G.) The court has reviewed the parties' joint

2   submissions and directs the parties to enter a proposed stipulated protective order

3   consistent with this order.

II.   ANALYSIS

5   The court reviews each of the parties' disputed proposed revisions to the Western

6   District of Washington's model protective order and resolves the disputes.

A.   Scope

8   The parties have agreed to add a paragraph to the model order's "Scope"

9   paragraph (Section 3) that explicitly places certain material beyond the scope of the

10 protective order. (*See* Pls' Prop. Order at 2-3; Providence's Prop. Order at 2-3.)

11 However, the parties disagree about some of the language in that paragraph.

12   Providence's proposed order provides that certain material will be exempt from

13 the order "except as required by [the Health Insurance Portability and Accountability Act

14 ('HIPAA')], RCW Ch. 70.02, or other statutory or regulatory privacy protections."

15 (Providence's Prop. Order at 2-3.) Providence's proposed order further exempts material

16 "lawfully and properly" in the public domain. (*Id.*) Providence argues that both clauses

17 are necessary to comply with its obligations to protect its patients' protected healthcare

18 information ("PHI").[1] (Joint Statement at 3-4.) Plaintiffs' proposed order does not

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[1] HIPAA and its implementing regulations define the information within their ambit as "protected health information," while Washington's Uniform Health Care Information Act ("UHCIA") refers to "health care information." *Compare* 45 C.F.R. § 160.103 (defining "protected health information" as individually identifiable health information"), *with* RCW 70.02.010(17) (defining "health care information" as "any information . . . that identifies or can

1   include either of these phrases. (*See* Pls' Prop. Order at 2-3; *see generally* Joint

2   Statement (raising specific arguments regarding the "lawfully and properly" language but

3   not the patient privacy laws clause).)

4   　　The court agrees with Providence that the spirit of its proposed revision to this

5   section regarding compliance with state and federal patient privacy laws is necessary to

6   ensure it complies with its obligations to protect PHI, but finds Providence's wording too

7   vague. Instead, the court concludes that Providence's objectives are accomplished if this

8   clause is limited to HIPAA, RCW CH. 70.02, and each statute's implementing

9   regulations.

10   　　Plaintiffs contend that Providence's "lawfully and properly" language would

11   impose an undue burden on them to determine whether information entered the public

12   domain unlawfully or unproperly. (*See* Joint Statement at 3.) Providence argues that this

13   language is necessary to allow it "to designate as confidential information/documents that

14   become public in violation of the protective order or were improperly or unlawfully

15   acquired or disclosed." (*Id.*) The court agrees with Plaintiffs that the "lawfully and

16   properly" language would impose an undue burden on a party seeking to introduce

17   material that was already in the public domain, and further finds it unnecessary to

18   accomplish Providence's objectives; information or documents that become public in

19   violation of the order will be subject to the procedures set forth in Sections 8 and 9 of the

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22   readily be associated with the identity of a patient and directly relates to the patient's health
     care"). Here, the court refers to both categories as "PHI."

1   parties' protective order. (*See, e.g.*, Providence's Prop. Order at 10-11.) The parties

2   must file a protective order that does not include "lawfully and properly."

3   Therefore, the second paragraph in Section 3 of the parties' protective order shall

4   state, "However, except as required by HIPAA, RCW Ch. 70.02, or either statute's

5   implementing regulations, the protections conferred by this agreement do not cover

6   information that (a) is in the public domain through trial or otherwise . . . ." The

7   remainder of that section shall reflect the parties' agreed-upon language. (*See id*. at 2-3;

8   Pls' Prop. Order at 2-3.)

9   **B.   Basic Principles Regarding Access to and Use of Confidential Material and
         Non-Termination and Return of Confidential Material**

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11   Plaintiffs propose changes to Sections 4.1 ("Basic Principles Regarding Access to

      and Use of Confidential Material") and 10 ("Non-Termination and Return of Confidential
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      Material") of this District's model protective order that would allow the parties or class
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      members to use confidential materials obtained here for collateral litigation in which the
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      parties "have an interest" (Joint Statement at 4) and in subsequent, related, or derivative
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      actions (*id*. at 10.) Providence opposes both changes, arguing both would violate their
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      patients' privacy interests under federal law. (*Id*. at 4-5, 10.) The court agrees with
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      Providence and declines to enter an order allowing any party to use this discovery in
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      collateral or subsequent proceedings, or for any reason other than the present litigation.
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         HIPAA typically prevents a covered entity from disclosing PHI without first
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      providing the patient with notice and an opportunity to object to the disclosure. *See* 45
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      C.F.R. § 164.512. A covered entity may nevertheless disclose PHI without prior notice
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1   in discovery where a qualifying protective order is in place. *See, e.g.*, *Ehrlich v. Union*

2   *Pac. R.R. Co.*, 302 F.R.D. 620, 628 (D. Kan. 2014); *In re Nat'l Hockey League Players'*

3   *Concussion Injury Litig*, 120 F. Supp. 3d 942, 953 (D. Minn. 2015); 45 C.F.R.

4   § 164.512(e)(1)(ii)(B), (e)(1)(v). A protective order satisfies HIPAA's requirements if it

5   (1) prohibits the parties from using or disclosing the PHI for any purpose other than the

6   litigation for which the information was requested and (2) requires the return or

7   destruction of the PHI at the conclusion of the litigation. 45 C.F.R. § 164.512(1)(e)(v); *In*

8   *re Nat'l Hockey League*, 120 F. Supp. 3d at 953. Were the court to enter a protective

9   order with Plaintiffs' proposed revisions to Sections 4.1 and 10, the protective order

10 would not comply with HIPAA; any disclosure of PHI would require compliance with

11 HIPAA's notice procedures.

12   Moreover, the Ninth Circuit has not adopted a policy that permits collateral

13 litigants automatic access to confidential information produced during discovery in

14 another action. *See Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1131-32 (9th

15 Cir. 2003). Instead, where collateral litigants seek access to discovery materials subject

16 to a protective order, they must move to modify the protective order and "demonstrate the

17 relevance of the protected discovery to the collateral proceedings and its general

18 discoverability therein." *Id*. (discussing the issuing court and collateral court's

19 involvement in determining whether such access should be granted). By allowing use of

20 discovery in collateral litigation in their proposed protective order, Plaintiffs effectively

21 seek an end-run around the procedures set forth in *Foltz* because they would be allowed

22 to share and use confidential health information without seeking leave to modify the

1   protective order and obtaining a relevancy determination from this court. *See id*. at 1132;

2   *see also HDT Bio Corp. v. Emcure Pharms., Ltd.*, Case No. C22-0334JLR, 2022 WL

3   4131589, at *1 (W.D. Wash. Sept. 9, 2022) (relying on *Foltz*'s reasoning to enter

4   non-sharing protective orders).

5   Accordingly, the court declines to adopt Plaintiffs' proposed revisions to Sections

6   4.1 and 10 of this District's model protective order. The parties shall enter a proposed

7   stipulated protective order with the versions of Sections 4.1 and 10 proposed by

8   Providence.

9   **C.   Disclosure of Confidential Material to Deposition Witnesses**

10   Plaintiffs propose diverting from the requirement in Section 4.2(f) of the model

11 order that witnesses sign the "Acknowledgment and Agreement to Be Bound" before

12 receiving confidential material during a deposition. (*See* Joint Statement at 5.) Plaintiffs

13 argue that a verbal acknowledgment is "less unwieldy" and preferable in Zoom

14 depositions and for lay witnesses. (*Id*.) Providence disagrees, arguing the revision "is

15 vague and fails to ensure that a witness clearly understands" their obligations under the

16 protective order. (*See id*. at 5-6.) The court agrees with Providence and orders the

17 parties to enter a proposed stipulated protective order that maintains the model order's

18 signature requirement in Section 4.2(f).

19 **D.   Filing Confidential Material**

20   Plaintiffs propose replacing Section 4.3 ("Filing Confidential Material") of the

21 model order with a procedure that eliminates the meet-and-confer requirement imposed

22 by the model order and allows any party to file materials marked "Confidential" under

1   seal so long as no party has attempted to challenge the materials' confidential status. (*See*

2   Joint Statement at 5.) Providence argues that this revision would allow the parties to

3   circumvent the procedures for filing documents under seal outlined in this District's local

4   rules and instead proposes the parties' protective order maintains the model order's

5   procedures for filing confidential material. (*See id.*); *see also* Local Rules W.D. Wash.

6   LCR 5(g). Because of the "strong presumption of public access to the court's files," *see*

7   Local Rules W.D. Wash. LCR 5(g), the court declines to adopt Plaintiffs' proposed

8   changes to Section 4.3. The parties shall enter a proposed stipulated protective order that

9   maintains the procedures for filing confidential information under seal set forth in Section

10 4.3 of the model order.

11 **E.   Compliance with State and Federal Health Care Information Laws**

12   The parties vigorously dispute the language in their proposed protective order that

13 should govern the use of PHI. (*See* Joint Statement at 7-10.) Plaintiffs propose using

14 portions of a sample HIPAA protective order from the United States District Court for the

15 Northern District of Illinois. (*See id*. at 4; Pls.' Prop. Order at 7.) Plaintiffs' proposed

16 language includes a blanket authorization for the use and disclosure of PHI in connection

17 with the lawsuit. (*See* Pls' Prop. Order at 4-5.) Providence proposes the addition of two

18 subsections to the model order, requiring parties seeking discovery of PHI to comply with

19 the UHCIA and HIPAA. (*See* Providence's Prop. Order at 5 (creating new Section 4.4

20 requiring compliance with UHCIA and new Section 4.5 requiring compliance with

21 HIPAA).)

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1   Providence argues that its proposed language complies with both the UHCIA's

2   requirement that a party seeking PHI in discovery must provide advanced notice to the

3   patient and provider and with HIPAA's requirements for qualifying protective orders.

4   (*See* Joint Statement at 7-8 (first citing RCW 70.02.060; and then citing 45 C.F.R.

5   § 164.512(e)(1)(ii)); *see also supra* § II.B.) Providence argues that Plaintiffs' proposed

6   language fails to comply with these requirements and eliminates the language from the

7   Northern District of Illinois's model order required by HIPAA. (Joint Statement at 8-10.)

8   The court agrees that Providence's proposed subsections requiring compliance

9   with the UHCIA and HIPAA are best suited to ensure proposed class members' privacy

10   interests are protected in this litigation. Accordingly, the court orders the parties to enter

11   a protective order with Sections 4.4 and 4.5 of Providence's Proposed Order.

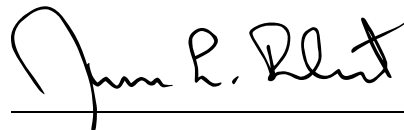12   **F.   Inadvertent Production of Privileged or Otherwise Protected Material**

13   Plaintiffs propose adding an additional section to the model order specifying that

14   inadvertent disclosures will not constitute waivers of privilege or other protection. (Pls'

15   Prop. Order at 9.) Providence opposes the addition as unnecessary because Section 9 of

16   the model order already sets forth procedures following inadvertent production of

17   privileged information and enters a non-waiver order. (*See* Joint Statement at 10.)

18   Plaintiffs do not address this argument. (*See id*.) The court agrees with Providence that

19   Section 9 of the model order succinctly and thoroughly protects inadvertent privileged

20   disclosures and Plaintiffs' addition is unnecessary. The court therefore orders the parties

21   to enter a stipulated protective order that does not include Plaintiffs' proposed Section 11.

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III.   CONCLUSION

For the foregoing reasons, the court ORDERS the parties to file a proposed stipulated protective order that complies with this order no later than **April 20, 2023**. Specifically, the parties shall file a proposed stipulated protective order that conforms with Providence's Proposed Protective Order (Dkt. # 67-4) EXCEPT that Section 3 ("Scope") of the proposed stipulated protective order shall use the language prescribed by the court (*see supra* § II.A).

Dated this 13th day of April, 2023.

JAMES L. ROBART
United States District Judge

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